DATO' SERI S SAMY VELLU

v.

PENERBITAN SAHABAT (M) SDN BHD & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S6-23-72-2003]
9 MAY 2005

CIVIL PROCEDURE: *Action - Abatement - Plaintiff commencing action in tort (libel, conspiracy and malicious falsehood) against defendants - Second defendant passed away - Whether right of action in tort abated - Actio personalis moritur cum persona - Civil Law Act 1956, s. 8(1)*

The plaintiff, a current member of the Malaysian Cabinet and the President of the Malaysian Indian Congress, commenced an action for libel, conspiracy and malicious falsehood against the first and second defendants for what was termed as a campaign to vilify him as a traitor of the socio-economic interests of the Indian community in Malaysia, as well as suggesting that he was unfit to be a member of the Government. The first defendant publishes the Malaysia Nanban, a Tamil language daily, while the second defendant was the first defendant's editorial advisor. On 28 March 2005, during the pendency of the action, the second defendant passed away. Notwithstanding the death, the plaintiff maintained that he was interested in pursuing his claim with a view to securing damages against the estate of the second defendant. The issue herein before the court was whether the various right of action of the plaintiff against the second defendant would abate upon the latter's demise.

Held:

[1] The right or cause of action in the tort of libel must abate by virtue of s. 8(1) of the Civil Law Act 1956 which applies the general rule of action *personalis moritur cum persona*. No action can be commenced against the estate of a deceased defamer, and if the defendant dies before the verdict is handed down, the action abates.

[2] With regard to the tort of conspiracy, the claim by the plaintiff related to a claim for conspiracy to injure by publishing defamatory statements in the Malaysia Nanban. There was no separate tort of conspiracy to defame. The tort of conspiracy to defame by publishing defamatory statements merged with the plaintiff's claim for libel. Therefore, the claim for conspiracy must abate with the death of the second defendant.

[3] The tort of malicious falsehood is not caught by the proviso to s. 8(1) of the Civil Law Act 1956. An action for malicious falsehood is not an action for libel, rather it is an action for damages willfully and intentionally done without lawful excuse. The plaintiff's claim for malicious falsehood survived the death of the second defendant.

[4] The plaintiff's claim for malicious falsehood would protect the plaintiff's interest in the deceased second defendant's property. The plaintiff's right to sue the deceased second defendant survived and such right was transmitted to the deceased second defendant's personal representatives and administrators.

Case(s) referred to:
Astrovlanis Compania Naviera SA v. Linard [1972] 2 QB 611 ***(refd)***
Brown v. Feeney [1906] 1 KB 563 ***(refd)***
Hatchard v. Mege & Ors [1887] 18 QBD 771 ***(refd)***
Lonrho plc v. Fayed & Ors [1991] 3 All ER 303 ***(refd)***
Lonrho plc & Ors v. Fayed & Ors (No 5) [1994] 1 All ER 188 ***(refd)***
Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 ***(refd)***
Milbank v. Milbank [1900] 1 Ch 376 ***(refd)***
Mitchell v. Australian Broadcasting Commission [1958] 60 WAIR 38 ***(refd)***
Monson v. Tussauds Ltd [1894] 1 QB 671 ***(refd)***
Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors [1978] 2 MLJ 123 ***(refd)***
Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Berhad & Ors [1979] 1 MLJ 71 ***(refd)***
Mulcahy v. R [1868] LR 3 HL 306 ***(refd)***
Philipps v. Philipps [1878] 4 QBD 139 ***(refd)***
Ratcliffe v. Evans [1892] 2 QB 524 ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Ward v. Lewis & Ors [1955] 1 WLR 9 ***(refd)***
Yorkshire Provident Life Assurance Co v. Gilbert [1895] 2 QB 148 ***(refd)***
Youssoupoff v. Metro-Goldwyn-Mayer Pictures [1934] 50 TLR 581 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 8(1)

Other source(s) referred to:
Bullen & Leake & Jacob's Precedents of Pleadings, 15th edn, vol 1, p 543
Clerk & Lindsell on Torts, 18th edn, p 1244
Gatley on Libel and Slander, 10th edn, p 205
Halsbury's Laws of England, 4th edn, vol 28, pp 116, 138

For the plaintiff - Jeffrey John (Frida Krishnan with him); M/s Shafee & Co
For the defendants - Rajasingam Gothandapani (K Saraswathi with him); M/s Shearn Delamore & Co

JUDGMENT

Abdul Malik Ishak J:

Introduction

The second defendant by the name of Kumana Pupathi a/l Atimulam @ Athi Kumanan had passed away. His death gave rise to the question of whether the various causes of action in the plaintiff's amended statement of claim would abate.

In the indorsement of claim to the amended writ of summons, the plaintiff claimed for the following causes of action (and this was also reflected at para. 15 of the amended statement of claim):

(a) damages for the tort of conspiracy;

(b) damages for the tort of malicious falsehood; and

(c) damages for the tort of libel.

Tort Of Conspiracy

Lord Devlin in *Rookes v. Barnard* [1964] AC 1129, 1204 aptly said:

> There are, as is well known, two sorts of conspiracies, the *Quinn v. Leathem* [1901] AC 495 type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means.

This very passage has received the approval of the House of Lords in the case of *Lonrho plc v. Fayed and Others* [1991] 3 All ER 303.

In *Mulcahy v. R* [1868] LR 3 HL 306 at 317, conspiracy is said to be "the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."

I pause here for a moment and I wonder why should the conduct of two be actionable when the same conduct by one can also wreck havoc. According to Gatehouse J in *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc*. [1990] 1 QB 391, 402 to 403 it "makes no sense in twentieth century trading conditions" especially when a single juristic person like a multi-national conglomerate may wield immense political and financial power.

In the context of the present case, the plaintiff argued that the tort of conspiracy to defame by publishing defamatory statements exist independently whereas the defendants say that it has merged with the tort of libel. Is there a merger of these two torts?

Tort Of Malicious Falsehood

It consists of false statements made to other persons concerning the plaintiff whereby the plaintiff suffers loss through the action of others. As a general rule, it is an actionable wrong maliciously to make a false statement regarding any person or his property with the result that other persons are deceived and are induced to act in a manner which causes loss to him (*Ratcliffe v. Evans* [1892] 2 QB 524, 527). At p. 532 of the report of the case of *Ratcliffe v. Evans (supra)*, Bowen LJ had this to say:

> … an action will lie for written or oral falsehoods, not actionable per se, or even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage ….

Tort Of Libel

There are two kinds of defamation. One is libel, the other is slander.

Libel consists of defamatory statement made in some permanent and visible form like writing, printing, pictures or effigies (*Monson v. Tussauds Ltd* [1894] 1 QB 671, 692). Slander consists of spoken words, gestures or inarticulate but significant sounds. It is often said that libel is addressed to the eye while slander is addressed to the ear (*Mitchell v. Australian Broadcasting Commission* [1958] 60 WAIR 38). In *Youssoupoff v. Metro-Goldwyn-Mayer Pictures* [1934] 50 TLR 581, the Court of Appeal held that defamation in a "talking" film was libel.

It must be borne in mind that:

(1) Libel is not only an actionable tort, it is also a criminal offence; whereas, on the other hand, slander is a civil matter only.

(2) In all cases, libel is actionable *per se*; whereas slander is actionable on proof of actual damage.

To The Heart Of The Matter

With that brief discourse on the law, I will now proceed to the main issue at hand. Would the various causes of action abate as against the second defendant when he died on 28 March 2005? Mr. Azhar Azizan Harun for the plaintiff emphasised that notwithstanding the death of the second defendant, the plaintiff was interested in securing damages against the estate of the second defendant. I merely took note of this salient argument and proceeded to hear the parties. Mr. Azhar Azizan Harun pointed out that:

(1) the action for the tort of libel abated on the death of either party to the action and this meant that upon the death of the second defendant the action for the tort of libel abated automatically;

(2) since the claim against the second defendant for the tort of malicious falsehood protected the claimants' interests in the second defendant's property, then this right survived and was transmitted to the second defendant's personal representatives and administrators; and

(3) the action for tort of conspiracy did not merge with the other co-existing causes of action because the Amended Statement of Claim clearly prayed for damages for conspiracy as a separate and distinct tort from the other pleaded causes of action and that being the case, the issue of abatement in relation to the action for the tort of conspiracy did not arise at all.

For the defendants, Mr. Rajasingam Gothandapani argued that the only surviving cause of action against the second defendant was for the tort of malicious falsehood. And that the action for the tort of conspiracy and the action for the tort of libel abated with the death of the second defendant.

I will now refer to the relevant passages in the amended statement of claim that reflected the various causes of action.

For the tort of conspiracy, I must refer to paras 6, 7 and 8 of the amended statement of claim and they were worded as follows:

> 6. At all material times, the said Pandithan has shown antagonism and hostility to the Plaintiff ever since his expulsion from the MIC by the latter for conduct demeaning of the party (MIC). The said hostility has been exacerbated by the Plaintiff and of the MIC's continued objection to the IPF joining the Barisan Nasional coalition.
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> 7. Since October 2003 onwards the 1st and 2nd Defendants have in conspiracy with the said Pandithan and one V. Sengutuvan (the General Secretary of IPF) engaged in a systematic campaign of malicious falsehood and libel of the Plaintiff with the sole purpose of injuring the reputation and credit of the Plaintiff.
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> 8. In pursuance of the said conspiracy referred to above, the Defendants did the following overt acts (since on or about 11.11.2003) of publishing or causing to be published news and news articles in the said newspaper, denigrating and vilifying the Plaintiff and the MIC, with the view of destroying the Plaintiff's political career and his capacity as a Minister in the Government of Malaysia.

Particulars

(a) In or about October 2003, the said Pandithan, albeit not a member of the MIC, commenced a hostile campaign against the Plaintiff calling on him to step down as the President of the MIC which was prominently covered by the 1st Defendant in its newspaper and duly given wide publicity.

(b) In its publication of 11.11.2003, the Defendants wantonly and maliciously wrote and published in Tamil in the said newspaper (at page 3) under the banner heading 'An appeal to Dato' Seri Samy Vellu from Ordinary Athi Kumanan', in relation to the Plaintiff's disclosure that the said Pandithan had sought to obtain a title for the 2nd Defendant by false representation to His Majesty the King that the 2nd Defendant was a Vice-President of the IPF (when he was not), matters disparaging of the Plaintiff, which were untrue and false, as follows:

Award Matter

1. In yesterday's New Straits Times there is a false news which claimed that Dato' Seri Samy Vellu said that on the recommendation of IPF, last year some award was given to me by the King.

This is a lie. An utter lie. I have asked my lawyers to look into this matter.

Three years ago, late King conferred me the JMN award.

Only that I received.

For that IPF also didn't recommend me. MIC also didn't recommend me.

(When will ever MIC recommend?)

Other than that as they are telling I haven't got any award by telling lies.

Awards are given by government. Given by King. Nobody can request those.

I too have not asked anybody about this. Nobody has given this too. How many police complaints also they can make. I am not worried.

Why MAIKA In Loss? (sic – is losing?)

2. You said to raise the economy of the Indian community and the poor Indian community pawned their jewels, borrowed from the bank and gave more than RM100 million.

What happened to that money?

Today there is a case going on to close that MAIKA Holdings, why such state of affairs?

3. Why do the sub-companies of MAIKA Holdings show 90% of loss in their account?

Is it irresponsible leadership? Or is it the management that established that? Or any misappropriation?

Dato' Seri Samy Vellu, give answer to the 60 thousand members of MAIKA who trusted you.'

University Belongs to Whom?

4. You are collecting money for MIC's Medical University. It is proper that it reaches MIED. OK.

But it is said that the university belongs to a Sendirian Berhad Company.

Don't you have a responsibility to answer that you are collecting from the general public?

MIC Medical University belongs to whom? Is it to MIC? Or to a private company?

What will happen to the money given by (the) people?

Telecom Shares

5. You said that you are going to raise the Indian community through MAIKA, the economic arm and collected RM100 Million.

You kept aside (designated) the 9 million Telecom shares to mere RM2 companies. Why is it? Is there an explanation to that till today?

All these are related to the community. The money that was given to you in good trust by the community.

Isn't there a need for you to give an answer to that?

You are the sole representative of the Indian community at the cabinet.

Don't you have to answer the questions asked by the community?

Simply scolding away the ones who ask questions is of no use.

It is not the work of a leader too.

We are not challenging. We are not as great a person as you.

We are ordinary people on behalf of the community. Will you answer these questions of the poor people who collected and gave funds whenever you asked? Leader?'

(c) Next, in its publication of 12.11.2003, the Defendants, wantonly and maliciously wrote and published in Tamil, quoting the said V. Sengutuvan, the General Secretary of IPF, as saying under the banner heading, 'The whole country knows who is the liar. He has touched the nest of hornets. We will hound and sting Samy Vellu', matters disparaging of the Plaintiffs, which were untrue and false, as follows (at pages 1 and 2):

> It is not our leader who cheated and swindled the Indian community. It is funny that today those who pawned and cheated the Indian community say that our leader is a liar says V Sengutuvan, the General Secretary of IPF party. Just because an editor of a Tamil magazine should get Datukship, our leader Datuk MG Pandithan acted in accordance to the decision of our party's Central Working committee.'

'What Samy Vellu (is) telling is a lie

What Samy Vellu says as to Datuk Pandithan has cheated the King and palace officials is a blatant lie.

We don't do fraudulent activities such as cheating people by telling lies, collecting money from the people and putting privately into Sendirian Berhad and swindling people.

The community knows as to who is collecting money from the people and misappropriating.'

'Phantom Members

This is how there are thousands of members who are phantom members in MIC. Through this it has come to light that Samy Vellu has cheated the Barisan government.

It is better for Samy Vellu to retire from his office. It will be excellent to accept the act in accordance to the advice of former Prime Minister. When he was the Prime Minister, praising him; when he is not in the post coming and sticking to the new premier. All these play act and dramatisation will not augur (well) with Dato' Seri Abdullah Ahmad Badawi.

You who have betrayed your own race, how are you going to protect the community? It is enough that in your leadership the community is fragmented. It is better for you to retire from your office for the sake of the rest to live in unity.'

'Listening to your uncivilised talk, even your own party members have been anguished. On the basis of protecting one's prestige and respect is best they have kept silence.

But even now listening to your vulgar talk they have been embarrassed and humiliated with shame. You who have given empty promises and cheated the community for the past 24 years is the supreme most liar.'

(d) Further, in its publication of the said newspaper of 13.11.2003, the Defendants wantonly and maliciously wrote and published in Tamil (by again quoting the said V. Sengutuvan) under the banner heading (at page 1), 'Samy Vellu Who Said That Pandithan Is Lying Is Alone Lying' matters disparaging of the Plaintiff, which were untrue and false, as follows (at page 1, Front-page):

'In the name of Maika Holdings, Dato' Seri S. Samy Vellu is the one by collecting RM100 million has swindled the Indian community and has made them paupers'.

'Whose is the Medical University?

Today Dato' Seri Samy Vellu is the one deceiving the community and lying by saying that it is MIC Medical University but registering it under a private Sendirian Berhad Company and collecting contributions from the Indian community. Very soon this community will come to know as to who is telling lies.'

(e) In its publication of the said newspaper of 14.11.2003, the Defendants wantonly and maliciously wrote and published in Tamil, by quoting the said Pandithan, under the banner heading (at page 1) 'A Secret Letter Sent To Tun Mahathir. How Can Samy Vellu Release? A Police Complaint Will be Made; Samy might be sentenced to 7 years to Prison' matters disparaging of the Plaintiff, which were also untrue and false, as follows (pages 1 and 3):

'The Criminal Offence of Samy Vellu

A recommendation appeal that has been sealed as a classified government document cannot be revealed. When there is such a status, Samy Vellu publicising it is a crime.

Police will have to make investigation as to how did it reach the hands of Samy Vellu when the letter was under the security of the government secret documents? Or did he steal that? Who gave it to him? Samy Vellu, who is openly publicising the government secret documents among the public has no right to be the national leader of MIC and also to be a minister.'

'Crime Against the Nation

Without understanding the meaning of a form that is a government secret and Samy Vellu releasing it, is a crime against the nation.

Datuk MG Pandithan said that IPF Party would give a complaint to the Police against Samy Vellu who has released the government secret, confused the public and defamed the palace.'

'Did not act deceitfully

In the appeal by IPF party to give Datukship to brother Athi Kumanan, there is no deceit or fraud involved. We did not go to the palace and meet the officials. We did not get the award by telling lies to the King.

'IPF and myself did not have the intention to get the award for brother Athi Kumanan by telling lies,' clarified Datuk Pandithan.

Without understanding and without getting a proper explanation Samy Vellu has wrongfully given a meaning to a situation.

It is Samy Vellu who has released this information for his own office comfort and to make a profit among the public is a criminal.'

How did Samy Vellu Get the Secret Letter?

The letter that I wrote to the Prime Minister was kept in the Government Registry and that too in the classified files of the government. How did that letter reach the hands of Samy Vellu?

It is foolishness to say that former IPF member Munian from Serdang sent to him by post.

He raised a question that whether an ordinary Munian enter into Prime Minister's Department, take the letter without the knowledge of the officials and could have given it to Samy Vellu?

If Samy Vellu would have received the letter in his hands on the basis that he is a veteran minister who is leading the country, he should have surrendered the letter to the Police or at the Cabinet Ministers' Meeting.

If he would have surrendered the letter to the Police, Samy Vellu would have been a straightforward minister.

Now there is a question raised as to whether Samy Vellu who released government documents for his selfishness and greed for the office is a trustworthy minister.

He raised the question, 'Who knows Samy Vellu who has released the document today has released how many more classified documents of government before?'

Seven Years Imprisonment

Since he has agreed to releasing the classified documents, it is (a) clear (breach under section 8(2) of the Act in that he has failed to protect) the government classified documents. He said that the party would make a police complaint to take an action against Samy Vellu.

Under this Act, one can be sentenced to imprisonment not more than seven years and not less than one year.

For publicising government secret to the public, under section 8(1) one can be sentenced to imprisonment not more than seven years and not less than one year.

One who is in the office of a minister takes an Oath of Secrecy to protect government secrets. But Samy Vellu has acted (and) violated this Oath.

Samy Vellu who has been a veteran minister in the government for a long time, due to his political selfish reasons without taking the information properly to the scrutiny of the cabinet, for his own benefit has misused his political position.

He very decisively said that a police complaint would definitely be made against Samy Vellu who has brought shame to the leadership of Dato' Seri Abdullah Ahmad Badawi through the misuse of his authority.'

(f) In its publications of the said newspaper on 15.11.2003, 16.11.2003 and 17.11.2003, the Defendants further wantonly and maliciously wrote and published in Tamil under the following banner headings (all at page 1) 'Police Complaint Against Dato' Seri Samy Vellu'. 'What Happened to RM100 million given to MAIKA by the Indian Community? Dato' Seri Samy Vellu Must (Give) An Answer. Pandithan who collected RM7 million (For MAIKA) Asks'; and 'RM100 million given by (the) Indian Community in trust to Samy Vellu is embezzled. Nationwide Police Complaints' matters which were disparaging (of) the Plaintiff, which were also patently false and untrue.

(g) By its publication of the said newspaper of 18.11.2003, the Defendants wantonly and maliciously wrote and published in Tamil under the banner heading (at page 1) 'Poor Indian Community in Misery' matters disparaging of the plaintiff, which were also untrue and false. Further, also in the issue of the said newspaper of 18.11.2003 referred to above, the Defendants wantonly and maliciously wrote and published in Tamil under the heading 'See the Track Record of Samy Vellu. 70 million Lost in all Companies Belongs to Maika' (at page 3) more falsehood and untruths about the Plaintiff. In this regard, the Defendants purported to set out a list of subsidiaries of the Maika Holdings Bhd ('Maika') which according to them had suffered losses. However, the Plaintiff avers that the said list is patently false and untrue as it contains at least five (5) companies which are no longer subsidiaries of Maika (ie Anthonian Store Sdn Bhd, Suriavathi Sdn Bhd, Maika Osh Sdn Bhd, Syarikat Pembenaan Mars Maju Sdn Bhd and Golden Land Development Sdn Bhd). Further, the Defendants have also falsely and untruthfully stated (also at page 3 of the said publication) that all the companies in the list were making losses when clearly from the list itself some of these companies are profitable (such as Oriental Capital Assurance Bhd, Sidacom Sdn Bhd and Foo Land Development Sdn Bhd).

(h) Also in its publication of the said newspaper of 18.11.2003, the Defendants further wantonly and maliciously wrote and published in Tamil, by again quoting the said Pandithan, under the banner heading. 'To bring about reformation in the Indian Community – to put an end to Samy Vellu's degrading speech. Come together as (a) united front: a united force. IPF National leader Datuk M.G. Pandithan', matters disparaging of the Plaintiff, which were wholly untrue and false, as follows:

> IPF party's national leader Datuk M.G. Pandithan has called on thousands of his followers to come together as a united front to oppose Samy Vellu (who) has been in position for the last 24 years and has destroyed, completely stripped the community and continues to be degrading and slanderous.'
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> 'He, in a 'culture' peculiar to himself, has indiscriminately uttered the words 'recalcitrants', 'flock of crows', 'party of recalcitrants'.
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> Thousands of my followers nationwide have been angered by his degrading and low class speech.
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> Not today, not yesterday, for the last 24 years Samy Vellu has silenced the community by arrogance.
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> His rude speeches and his attitude of treating people like slaves may be tolerated by members of his party.
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> But any Tamilian with self respect will no longer tolerate it. Having been a Minister for 24 years and said that he would uplift the economic status of the community and collected 106 million from the poor innocent people which has mysteriously vanished is a story which is known to the nation.
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> The incidents (where) Telekom shares which was granted by the government for the community was diverted to 2.00 ringgit company and the said shares were caused to disappear was witnessed by this poor community, which is unable to ask anything about it and was silent. If the investors were to ask for explanation, to beat and threaten them by using gangsters, to ridicule (them), to mock (them) has become Samy Vellu's nature.
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> If Samy Vellu continues to be the leader of the Indian Community, the community would be ruined and destroyed. It is time for my dear supporters to come together as a united front to oppose him.

(i) As of the date of this writ, the publications are ongoing on a daily basis.

Paragraphs 10 and 11 of the amended statement of claim reflected the tort of malicious falsehood and they were phrased in this way:

10. The Plaintiff will further rely on the particulars pleaded in paragraph 8 above, and particularly the words/statements therein which were false and which were made maliciously, and contend that the Defendants published the said words/statements as a malicious falsehood knowing that they were false and malicious. In this regard, the Plaintiff further contends and will contend that the said words/statements were calculated to cause damage to the Plaintiff in respect of his reputation and credit and by way of his profession and career as a politician and political leader in (the) Government.

Particulars of the Falsity

(1) That the Plaintiff 'pawned and cheated' the Indian community.

(2) That the Plaintiff indulges in fraudulent activities, such as cheating people by telling lies and swindling people.

(3) That the Plaintiff has included 'phantom members' in the MIC and he has therefore cheated the Barisan National.

(4) That the Plaintiff designated 9 million Telekom Shares to RM2 companies.

(5) That Maika is to be wound-up due to the Plaintiff's irresponsible leadership of it and further the Plaintiff has misappropriated funds belonging to Maika.

(6) That the Plaintiff is collecting money from the public for a private company under the guise of donations to MIC's Medical University.

(7) That the Plaintiff has committed a crime under the Official Secrets Act in relation to matters pleaded in paragraph 8 herein.

(8) That the Plaintiff treats his party members as slaves and has silenced the Indian community by his arrogance.

Particulars of Malice

(1) The Plaintiff repeats paragraphs 1 to 9 of the Statement of Claim herein.

(2) The systematic and daily campaign of publication denotes malice.

(3) The vituperative and falsity of the allegations.

(4) The fact of the combination and conspiracy as pleaded herein.

(5) The avowed objectives of the conspirators to drive the Plaintiff from office by a campaign as pleaded herein.

> 11. The Plaintiff avers that he has suffered damage and injury including special damage by way of his office and profession as pleaded herein, which damage is both of a pecuniary and non-pecuniary type.

In regard to the tort of libel, para. 12 of the amended statement of claim should be referred to:

> Further and/or in the alternative, by reason of the matters stated in paragraph 8 above, the Plaintiff contends that the Defendants had falsely and maliciously published or caused to be written and published of and concerning the Plaintiff, the said articles in the Tamil language which were libellous of the Plaintiff. Copies of all the articles referred to in paragraph 8 above together with the Bahasa Malaysia and English translations are annexed to the Writ, cumulatively as Appendix A as they are too numerous to be set out herein seriatim. The Plaintiff states that he relies on each and every allegation stated therein as constituting a libel bearing the meaning contained in the Particulars in paragraph 13 herein.

Upon reading the amended statement of claim, the defendants here must have been put on guard. It has always been the rule that the litigation between the parties should be conducted fairly, openly and without surprise. It is also for the purpose of reducing costs (*Astrovlanis Compania Naviera S.A. v. Linard* [1972] 2 QB 611; [1972] 2 WLR 1414). Of significance is this. That it is to limit and define the issues to be tried as well as to enable discovery to be made expeditiously (*Yorkshire Provident Life Assurance Co. v. Gilbert* [1895] 2 QB 148; and *Milbank v. Milbank* [1900] 1 Ch. 376, 385). It goes without saying that each party must state his case with precision so that the opponent would know what is the real issue in dispute. In the words of Cotton LJ in the case of *Philipps v. Philipps* [1878] 4 QBD 139:

> What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they will have to meet when the case comes on for trial.

Conspiracy

Now, in regard to the tort of conspiracy, the alleged claim by the plaintiff relates to a claim for conspiracy to defame. There is no separate tort of conspiracy to defame. In fact the tort of conspiracy to defame merges with the plaintiff's claim for libel. Denning LJ in *Ward v. Lewis And Others* [1955] 1 WLR 9, 11 aptly said:

> It is important to remember (and we had a case only last week on this point) that when a tort has been committed by two or more persons an allegation of a prior conspiracy to commit the tort adds nothing. The prior agreement merges in the tort.

And Abdul Hamid Omar J (who later rose to be the Lord President) vigorously applied *Ward v. Lewis (supra)* in *Mrs. Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd. & Ors.* [1978] 2 MLJ 123 and held that the claim "to conspire to defame" had merged with the claim of libel and his Lordship magnanimously allowed the application to strike out the allegation pertaining to conspiracy to defame. On appeal to the Federal Court, the decision of Abdul Hamid Omar J (who later rose to be the Lord President) was affirmed *vide Mrs. Kok Wee Kiat v. Kuala Lumpur Stock Exchange Berhad & Ors.* [1979] 1 MLJ 71 and Wan Suleiman FJ delivering the judgment of the Federal Court had this to say (see p. 72 to p. 73 of the report):

> And now to the question of whether there is a merger between conspiracy to defame and libel, *Clerk & Lindsell on Torts* – 13th Edition at page 817 states 'A conspiracy consists … in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.' The conspiracy in this instance, according to Mr. Wong is one to remove the appellant from her lawful employment.
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> Referring to the wording of paragraphs 9 & 10 of the statement of claim, he submitted that the judge had failed to consider that some of the parties may be liable for the tort of conspiracy only and others for libel, so that different damages would arise from the same set of facts.
>
> With respect we would say that Mr. Wong is in error. 'All persons concerned in the commission of a joint tort are jointly and severally liable for all the damages caused by it' (see *Gatley on Libel & Slander*, 7th Edition page 243 para 244). Thus the originators of a petition, praying for the removal from office of a public official, are jointly and severally liable with the person who drafted the petition for any defamatory statements contained therein (paragraph 245 of the same volume).
>
> What Denning LJ said in *Ward v. Lewis & Ors.* [1955] 1 WLR 9, 11 was most aptly cited in the judgment of the court below. The conspiracy to defame had indeed merged with the claim for libel. Therefore the learned judge was with respect right in making the order to strike out the allegations in paragraphs 9 & 10 of the statement of claim referring to the conspiracy to defame.

Buttressed by these authorities, the defendants say that the action for the tort of conspiracy to defame cannot survive upon the demise of the second defendant because the tort of conspiracy to defame is deemed to have merged with the claim for libel.

But the plaintiff says that there are two kinds of conspiracy where the elements are distinct and they are as follows:

(1) an unlawful means conspiracy where the participants combine together to perform acts which are in themselves unlawful; and

(2) a combination to perform acts which, although not themselves *per se* unlawful, are done with the sole or predominant purpose of injuring the claimant.

The plaintiff further says that the action for the tort of conspiracy is founded on the basis of it being a tortious conspiracy. And for this purpose, the case of *Lonrho plc v. Fayed and Others* [1991] 3 All ER 303, a decision of the House of Lords was cited. There Lord Bridge of Harwich, in the course of his judgment, had this to say at p. 310 to p. 311 of the report:

> Did the House in *Lonrho Ltd v. Shell Petroleum Co Ltd* [1981] 1 All ER 456, [1982] AC 173 depart from this reasoning and lay down for the first time a new principle that a plaintiff, seeking to establish the tort of conspiracy to injure, must in every case prove that the intention to injure him was the predominant purpose of the defendants, whether the means used were lawful or unlawful? Lonrho Ltd, as plaintiffs in that case, owned and operated a pipeline designed to carry oil from a port on the coast of Mozambique to an oil refinery in Southern Rhodesia. Following the unilateral declaration of independence (UDI) by the government of Southern Rhodesia, the United Kingdom enacted the Southern Rhodesia Act 1965 and the Southern Rhodesia (Petroleum) Order 1965, SI 1965/2140, made under that Act, prohibited Shell and BP, as companies incorporated in the United Kingdom, from supplying oil to Southern Rhodesia. The facts to be assumed for the purpose of answering the questions of law posed in the consultative case stated by arbitrators which brought the matter before the courts were that Shell and BP, by assuring the government Rhodesia that they would maintain the supply of oil to Southern Rhodesia, in spite of sanctions, had influenced both the inception and the continuation of UDI, and by supplying oil in breach of the 1965 sanctions order had prolonged the period during which Lonrho's pipeline was prevented from operating and thereby caused Lonrho foreseeable damage. But it was throughout common ground that the respondents had no intention to injure Lonrho.
>
> The only questions considered in detail when the case came before this House were, first, whether breach of the sanctions order gave rise to a right of action for breach of statutory duty and, secondly, in a question referred to in the consultative case as question 5(b), 'Whether the Claimants have a cause of action for damage alleged to have been caused by such breaches by virtue only of the allegation that there was an agreement to effect them' (see [1981] 2 All ER 456 at 460, [1982] AC 173 at 183). Both questions had been answered in the negative by Parker J at first instance (see [1981] Com LR 6) and by Lord Denning MR, Eveleigh and Fox LJJ in the Court of Appeal (see [1981] Com LR 74). They were similarly answered by the unanimous judgment of the House in which Lord Diplock delivered the only speech.

As the judgments in both courts below and the speech of Lord Diplock make clear, the fact dictating a negative answer to the second question was the absence of any intention to injure Lonrho. Parker J said:

> The claimants accept that there is no case in which an undirected crime, not itself a civil wrong, committed without intent to injure, has been held, or, I think, even alleged to be actionable on the mere ground that it was committed pursuant to agreement.

He concluded his judgment by saying:

> I answer question 5(b) in the negative on the specific ground that if the acts done in combination are not done with intent to harm the plaintiff and are not themselves actionable, the tort of conspiracy is not committed.

Lord Denning MR said ([1981] Com LR 74 at 74-75):

> So this point of law arises directly: is an agreement to do an unlawful act actionable at the suit of anyone who suffers damage from it which is reasonably foreseeable? Even though the agreement is not directed at him, nor done with intent to injure him? In discussing this point of law I put aside the many modern cases on conspiracy – in which there is an agreement by two or more to do a lawful act. It is now settled by the House of Lords that such an agreement is actionable if it is done with the predominant motive of injuring the plaintiff and does in fact injure him: see *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* ([1942] 1 All ER 142 at 149, [1942] AC 435 at 445), where Lord Simon, Lord Chancellor, said: 'Liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortuous conspiracy.' Here we are concerned with a different problem altogether. It is an agreement by two or more to do an unlawful act … I think there is a cause of action when it is remembered that the tort is a conspiracy to injure. I would suggest that a conspiracy to do an unlawful act – when there is an intent to injure the plaintiff and it is not aimed or directed at him – is not actionable, even though he is damaged thereby. But if there is an intent to injure him then it is actionable. The intent to injure may not be the predominant motive. It may be mixed with other motives. In this context, when the agreement is to do an unlawful act, we do not get into the 'quagmire of mixed motives,' as Lord Simon, Lord Chancellor, described them in the Crofters case ([1942] 1 All ER 142 at 149, [1942] AC 435 at 445). It is sufficient if the conspiracy is aimed or directed at the plaintiff, and it can reasonably be foreseen that it may injure him, and does in fact injure him. That is what Mr Justice Parker thought. I agree with him. (Lord Denning MR's emphasis).

It is the speech of Lord Denning MR as reproduced above that was emphasised by the plaintiff's counsel. What Lord Denning MR had said was certainly interesting. In the instant case, it is stressed that the pleadings revealed that the defendants' predominant motive was to cause damage to the plaintiff and, in fact, so the submission went, damage did occur. Here, the plaintiff says that the tort of conspiracy against the defendants for which damages is claimed is said to be a separate tort actionable on its own. The plaintiff continues to submit along the following lines:

(1) that the action for conspiracy is purely to injure the plaintiff by way of his profession and career as a politician and as a political leader in the Government;

(2) that the conspiracy to injure will not abate because it can stand on its own two feet, so to speak, and that it does not merge with the action for damages;

(3) that it is important to distinguish instances where the court has held that actions for conspiracy to defame in fact merges with the action for libel;

(4) that the case of *Mrs. Kok Wee Kiat (supra)* can be distinguished in that there the relevant causes of action were concerned with conspiracy to defame as well as libel and there the court held that the action for conspiracy had merged with the action for libel because the action for conspiracy was for a conspiracy to defame;

(5) that, in the present case, the various causes of action for conspiracy, malicious falsehood and libel stand on its own;

(6) that the passage in the case of *Ban Guan Sendirian Berhad v. United Malaysian Steel Mills Berhad* [1977] 2 MLJ 52, 53 needs to be reproduced. There Wan Suleiman FJ said:

> Clearly if defendants can prove that there had been such a conspiracy then there is a right of action, for if, in the words of Viscount Simon LC in *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942] AC 435, 440 … as the result of such unlawful combination and misdemeanour, a private person receives a private injury, that gives such person a right of action.

and using this passage as a leverage, it is submitted that the action for the tort of conspiracy does not merge with the other co-existing causes of action; and

(7) that the action for the tort of conspiracy does not abate upon the death of the second defendant by virtue of s. 8 of the Civil Law Act 1956.

I have noted the submissions of the parties on both sides. I am of the considered view that the tort of conspiracy to defame merges with the plaintiff's claim for libel and it must abate upon the death of the second defendant. That would be my judgment and I so hold accordingly. It is also my judgment that the tort of malicious falsehood survives and that the case of *Mrs. Kok Wee Kiat* is still good law and it is binding on this court (see the Federal Court decision of Wan Suleiman FJ).

I was asked to take into account that the action in this case is still pending. I was also asked to consider that encl. 4 which is the plaintiff's inter partes application for an interlocutory injunction against the defendants has not been disposed of. I too was asked to recognise the fact that there is a pleaded cause of action for conspiracy where there is a subsisting claim for damages pleaded separately. But in taking into account all these, I also took note of the fact that the case of *Lonrho plc and Others v. Fayed and Others (No. 5)* [1994] 1 All ER 188, [1993] 1 WLR 1489 was not a case of a claim for defamation. However, the learned counsel for the plaintiff while acknowledging that that was so argued that the headnotes to the case of *Lonrho plc and Others v. Fayed and Others (No. 5)* showed that the claim was for conspiracy to injure by sponsoring a third party to publish defamatory statements about the plaintiff there and that the court there held that there was a cause of action for conspiracy to injure by sponsoring and financing the publication of defamatory statements. So, according to the learned counsel for the plaintiff, there is such a thing as conspiracy to injure by, *inter alia*, publishing defamatory statements.

It was vigorously submitted on behalf of the plaintiff that the argument centred on the question of whether the tort of conspiracy to injure by publishing defamatory statements has merged with the tort of libel or defamation. It was pointed out that the plaintiff has accepted that question and so the tort of libel has abated and that being the case there was nothing left to merge with. It is said that there is no claim for defamation anymore. It has died. In other words, so the submissions went, the causes of action for libel and defamation have disappeared. It is also said that all that is left would be the tort of malicious falsehood which do not abate. The tort of conspiracy to injure too by way of publishing defamatory statements has not abated as well.

Mr. Rajasingam Gothandapani, the learned counsel for the defendants, submitted by way of a rebuttal that the tort of conspiracy relate to the publication of defamatory statements about the plaintiff. And that an agreement or conspiracy to commit a tort must merge with the tort. Just like Mr. Azhar Azizan Harun, Mr. Rajasingam Gothandapani too emphasised that the *inter*

partes hearing of the interlocutory injunction in encl. 4 has not been disposed of. The learned counsel for the defendants further submitted that where a defendant puts up a defence of justification the court will not grant an injunction. But he placed a caveat in his submission. He pointed out that where there is conspiracy to injure then if it can be shown to be the case then the court may grant an injunction even if there is a defence of justification. I hearken to these submissions and I keep an open mind.

Here, the tort of conspiracy relates to conspiracy to injure by publishing defamatory statements in the Malaysia Nanban. It is pure and simple a cause of action for defamation. It is also a cause of action for libel which derives its origin from the root word "defamation". But, under the law, there is no separate tort of conspiracy to defame by publishing defamatory statements. And, under the law too, the tort of conspiracy to defame by publishing defamatory statements merge with the plaintiff's claim for libel (*Ward v. Lewis And Others (supra)* which was adopted by the High Court in *Mrs. Kok Wee Kiat*'s case *(supra)* and by the Federal Court in *Mrs. Kok Wee Kiat*'s case (*supra* also)) and it must abate with the death of the second defendant. That would be my judgment and I so hold accordingly.

Libel

The law is this. That the cause of action for the tort of libel must abate by virtue of s. 8(1) of the Civil Law Act 1956 which enacts as follows:

> Effect of death on certain causes of action
>
> 8(1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:
>
> > Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

Now, s. 8 of the Civil Law Act 1956 applies the general rule of *actio personalis moritur cum persona*. It simply means this. That no action can be commenced against the estate of a deceased defamer and if the defendant dies before the verdict is handed down, the action abates. This fair minded rule does not affect other claims against other persons who are said to be liable in the action such as the first defendant here (see *Gatley On Libel And Slander*, 10th edn at p. 205). It can safely be surmised that an action for libel is clearly captured by the provision to s. 8(1) of the Civil Law Act 1956 thereby excluding the general application of that section to the tort of defamation.

A personal action dies with the person when the person dies. This is what has happened to the deceased second defendant. *Osborn's Concise Law Dictionary*, 11th edn by Roger Bird defines the rule *actio personalis moritur cum persona* in this way:

> *actio personalis moritur cum persona.* [A personal action dies with the person]. No executor or administrator could sue or be sued for any tort committed against, or by, the deceased in his lifetime (except injuries to property); the right of action in tort was destroyed by the death of the injured or injuring party, because an act of tort was regarded originally as purely punitive and only later as compensatory. The rule is now confined to causes of action for defamation (Law Reform (Miscellaneous Provisions) Act 1934, s. 1(1), as amended). Exemplary damages are not recoverable (s. 1(2), as amended).

Halsbury's Laws of England, 4th edn, vol. 28 at p. 116 carries this passage:

> 227. Abatement of action on death of parties. On the death of either party to an action of libel or slander, the action abates even where special damage has accrued to the estate of the plaintiff (*Chamberlain v. Williamson* [1814] 2 M & S 408 at 415; *Pulling v. Great Eastern Rly Co* [1882] 9 QBD 110). However, there is no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment; and judgment may be given in such a case notwithstanding the death.

The headnotes to the case of *Brown v. Feeney* [1906] 1 KB 563 also merits reproduction. There it states as follows:

> The action was for libel. The defendant had paid into Court, by way of satisfaction, without denying liability, a sum of 1501. The plaintiff did not take the money out of Court. After the close of the pleadings, the action being yet untried, the defendant died, and the action therefore abated. The defendant's executors applied at chambers for an order for payment out to them of the money paid in as aforesaid. The master refused the application, and on appeal the learned judge affirmed his decision. The summons appeared to have been headed as issued in the action, which had abated, but it was agreed between the parties that no objection should be raised by reason of any technical difficulty arising from the form of the application, but that the Court should be asked to decide as on an originating summons to whom the money should be paid out.

The sum total of it all would be this. That the cause of action for libel must abate with the death of the second defendant.

Malicious Falsehood

The counsel on both sides agree that this cause of action survive notwithstanding the demise of the second defendant. I wholeheartedly agree with them.

It must be borne in mind that an action for malicious falsehood is not an action for libel, rather it is an action for damage wilfully and intentionally done without lawful excuse.

The comparison between malicious falsehood and defamation has been neatly set out by *Clerk & Lindsell on Torts*, 18th edn at p. 1244. There the learned authors had this to say:

> 23-03 **Malicious falsehood and defamation compared** Although malicious falsehood and defamation have different origins, there are obvious similarities between the two actions and the same facts may constitute both torts. This relationship between the two was successfully exploited in *Joyce v. Sengupta* [1993] 1 WLR 337, CA. The plaintiff alleged the defendants had written a 'grossly defamatory' article about her. In order to claim legal aid, the plaintiff sued for malicious falsehood, not defamation (Legal aid was not available for defamation: Legal Aid Act 1988, Sched. 2, Pt 2, para. 1. Now the Community Legal Service does not apply to malicious falsehood). The defendants' application to strike the claim out as an abuse of process (the 'true' claim being for defamation) was rejected by the Court of Appeal. The plaintiff was not obliged to pursue the most appropriate remedy and although the defendants were denied their automatic right to trial by jury by her action, the court still had a discretion to order one. However, there are clear and substantial differences between the torts, the most basic of which is that defamation protects the claimant's reputation, while malicious falsehood protects the claimant's interest in his property or trade (or economic interests more generally) (For a comparison, see *Street on Torts* (10th ed., 1999), pp. 141-142. See also *CHC Software Care Ltd v. Hopkins & Wood* [1993] F.S.R. 241, per Mummery J).

The general principle for the tort of malicious falsehood has been expounded by Bowen LJ in *Ratcliffe v. Evans (supra)* at p. 527 to p. 528, in the course of his judgment, in these salient words:

> This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with the result of a verdict for the plaintiff for 120 l. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the County Herald, a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we

> have to determine is, whether in such an action such general evidence of damage was admissible and sufficient. That an action will lie for written or oral falsehoods, no actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred.

Now, since the claim against the deceased second defendant for malicious falsehood would protect the plaintiff's interest in the deceased second defendant's property the right of the plaintiff to sue the deceased second defendant survives and such right is transmitted to the deceased second defendant's personal representatives and administrators. In *Hatchard v. Mege And Others* [1887] 18 QBD 771, Cotton LJ aptly said at p. 777 of the report:

> It has been argued that this is an action to recover damages: in one sense that is true; but it is an action for a wrong done, not to the intestate himself, but to his property; therefore the right to sue upon his death was transmitted to his personal representative. For the defendant, reliance has been placed upon the judgment of Lord Chelmsford in *Peek v. Gurney* (Law rep. 6 H. L. 377, at pp. 392, 393); it is sufficient to say that, in the opinion of his Lordship, the executors of the deceased director were not liable, because his estate derived no benefit from the misrepresentation to which he was a party; here the personal estate of the intestate was injured. The difference between the two cases seems to me very great.

It is part and parcel of my judgment that the tort of malicious falsehood is not caught by the proviso to s. 8(1) of the Civil Law Act 1956. *Bullen & Leake & Jacob's Precedents Of Pleadings*, 15th edn, vol. 1 at p. 543 carries this short and salient passage which merits reproduction. It is this:

> Actions for malicious, slander of title and slander of goods are distinct from actions for defamation.

This would be followed by a passage that appears in *Halsbury's Laws of England*, 4th edn, reissue, vol. 28 at p. 138 which reads as follows:

> Actions for malicious falsehood are in a category of their own and are quite distinct from actions for defamation.

That the tort of malicious falsehood survives upon the death of the second defendant cannot be doubted at all.

Conclusion

To recapitulate, there are three causes of action, namely:

(a) the tort of conspiracy which, on the facts, relate to the tort of conspiracy to defame by publishing defamatory statements;

(b) the tort of malicious falsehood; and

(c) the tort of libel.

In my judgment, the only surviving cause of action against the deceased second defendant is for the tort of malicious falsehood. The other two causes of action abated upon the death of the second defendant.